

# United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

September 27, 2006

The Honorable Thomas Barnett  
Assistant Attorney General  
Antitrust Division  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Assistant Attorney General Barnett:

We are writing regarding a practice that we view as contrary to the spirit and intent of the Tunney Act. It appears that the Justice Department has acquiesced in the parties to mergers and acquisitions prematurely closing their transactions in situations in which the Justice Department has sought a consent decree, prior to court approval for the consent decree pursuant to the Tunney Act.

As you know, the Tunney Act, codified at 15 U.S.C. § 16, requires that courts review all settlements in antitrust cases entered into by the Justice Department, and find these settlements to be in the public interest, before such settlements can be entered. The Tunney Act further requires that the proposed consent decree be made public and provides for a sixty day public comment period before it may be approved by the court. We believe this public comment and judicial review process to be essential to ensuring that such settlements are in the public interest. Indeed, several years ago we authored legislation to amend the Tunney Act to heighten the scrutiny courts must apply to review these settlements. This legislation was passed by Congress and enacted into law in 2004 as Public Law 108-237.

Despite these requirements of the Tunney Act, we have learned that the Justice Department commonly permits merging parties to consummate their transaction prior to completion of the Tunney Act review process, prior to the completion of the sixty day period of public comment, and prior to court approval of the consent decree. A recent example is the Verizon/MCI merger review proceeding. On October 27, 2005, the Justice Department filed a lawsuit to block the transaction unless a consent decree was in effect to remedy the merger's effect on competition. On the same day the lawsuit was filed, the Justice Department also entered into a stipulation that merely restricted Verizon and MCI from consummating the transaction "before this Stipulation has been filed with the Court." (October 27, 2005 Stipulation in U.S. v. Verizon Communications, Inc., et al, Para. IV.C.)

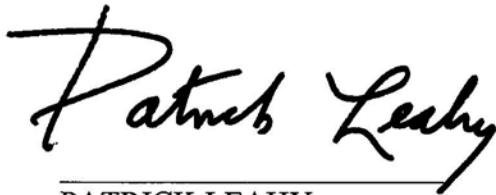
The Justice Department thereby permitted the merging parties to consummate their deal any time after the filing of the Stipulation. Verizon and MCI in fact consummated their merger on January 6, 2006. This date was more than a week prior to the end of the public comment period (which was January 15, 2006). More than eight months later, the court's review of this transaction under the Tunney Act is still ongoing. We understand that Justice Department's acquiescence in parties' closing transactions prior to the completion of the Tunney Act review process is common.

Serious questions arise as to whether endorsing the parties closing their deals in advance of Tunney Act review effectively negates the requirement of public interest judicial review. Should the court conclude the remedies in the proposed consent decree are inadequate to protect competition or otherwise not in the public interest, it must reject the proposed decree with respect to a deal that has already been completed. Courts are likely to be reluctant to reject a proposed consent decree in such circumstances. Indeed, doing so may be a pointless exercise given the difficulty in unwinding a merger that has already been completed. Allowing consummation of mergers prior to the Tunney Act review may, therefore, subvert both the opportunity for public comment and meaningful judicial review under the Tunney Act.

Therefore, we write to inquire as to why the Justice Department is permitting parties to close deals prior to Tunney Act review, and for an explanation of how permitting this procedure is consistent with the Tunney Act's mandate that Justice Department antitrust settlements not be effectuated prior to a judicial determination that the settlement is in the public interest.

Thank you for your attention to this matter.

Very respectfully yours,



PATRICK LEAHY  
Ranking Member  
Judiciary Committee



HERB KOHL  
Ranking Member  
Subcommittee on Antitrust,  
Competition Policy &  
Consumer Rights